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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

Estate of VIOLA Z. SILBERMAN, Deceased.	B148496 (Super. Ct. No. BP047736)
GENEVIEVE SILBERMAN, Petitioner and Respondent, v. MENG-YU CHENG ROE, Objector and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Gary Klausner, Judge. Affirmed.

Robert N. Rigdon for Objector and Appellant.

Mitchell, Silberberg & Knupp, Allan B. Cutrow, Peter B. Gelblum and Karl de Costa for Petitioner and Respondent.

INTRODUCTION

Meng-Yu Cheng Roe, the executor of the estate of Charles C. Y. Cheng, appeals from an order decreeing that respondent Geneviève Silberman, the adopted daughter of Viola Z. Silberman (Silberman), is entitled to distribution of the entirety of Silberman's estate. We affirm the order.

PROCEDURAL BACKGROUND

Silberman executed a declaration of trust and pour-over will on January 24, 1991. The declaration of trust transferred assets specifically described in exhibit A, attached to the declaration, to Charles C. Y. Cheng (Cheng), trustee. The settlor retained the right to revoke or change the trust during her lifetime, but it became irrevocable upon her death.

The trust was to terminate upon the settlor's death. After payment of the expenses of the settlor's final illness and funeral, the trustee was to distribute the entire trust estate. There are several specific beneficiaries named in the instrument, who cumulatively were to receive $60,000. Cheng was to receive the remainder of the trust estate. The settlor "intentionally omitted making provisions for all her heirs who are not specifically mentioned herein, and she expressly, generally and specifically disinherits her adopted daughter," respondent.

According to appellant, Silberman amended the provisions of the trust and executed a new declaration of trust on February 15, 1991. This declaration of trust again named Cheng as the residual trust beneficiary.[1]

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[1] Inasmuch as neither party has included the February 15, 1991 declaration of trust in the record, we cannot determine the manner in which the trust instrument was amended. It is clear, however, from our earlier unpublished opinion, *Silberman v. Cheng* (B118521, May 27, 1999), in which we affirmed the order invalidating the trust, that Cheng remained the residual beneficiary. (Typed opn., p. 2.) It is equally clear that the

Silberman died on February 27, 1996. On April 4, 1996, respondent sought to invalidate the provisions of the trust instrument omitting her as a beneficiary and naming Cheng as trustee and residual beneficiary of the trust. On August 22, 1997, following an evidentiary hearing held on August 13, the probate court invalidated the February 15, 1991 trust, finding it had been executed while Silberman was under Cheng's undue influence. The court expressly found that "[t]here was sufficient credible evidence to show . . . Cheng was in a position to control Viola Silberman's contacts with her adopted daughter, [respondent], with . . . her closest relatives, and did so. [¶] Furthermore, [Silberman] relied on . . . Cheng's advice. The dispositive provisions of the trust are evidence that [Cheng] prevailed in so influencing [Silberman]."

On August 23, 1999, Cheng petitioned for the probate of Silberman's January 24, 1991 will or, "in the alternative," her October 19, 1988 will and for letters testamentary. He sought appointment as executor of the Silberman estate. Respondent filed objections to the petition, arguing that appointment of Cheng as executor was improper in light of the August 22, 1997 order invalidating the February 15, 1991 trust due to the exercise of his undue influence over Silberman and that the January 24, 1991 will alone constituted Silberman's valid last will.

On October 29, 1999, the probate court ordered Silberman's January 24, 1991 will admitted to probate and sustained respondent's objection to the appointment of Cheng as executor. The court ordered Sanwa Bank to continue to act as special administrator "pending hearing on a Petition to Appoint Sanwa Bank as Administrator with Will Annexed, or until further order of the Court."

On June 6, 2000, respondent petitioned for a decree of entitlement to distribution pursuant to Probate Code section 11700.[2] She argued that the distribution provisions of

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February 15, 1991 instrument was not a mere amendment *to* the declaration of trust but a completely new trust declaration.

[2] Probate Code section 11700 permits "any person claiming to be a beneficiary or otherwise entitled to distribution of a share of the estate" to "file a petition for a court

the January 24, 1991 will were ineffective, thus entitling her to distribution of the estate by the laws of intestacy. Appellant, the executrix of Cheng's estate, filed a competing petition for a decree of entitlement to distribution on June 26, 2000. She also objected to respondent's petition for a decree.

On December 29, 2000, the probate court granted respondent's petition for a decree, while denying appellant's petition. The court found that respondent was entitled to distribution of Silberman's entire estate. This appeal followed the court's denial of appellant's motion for a new trial and to vacate the order determining entitlement to estate distribution.

CONTENTION

Appellant contends the trial court erred in decreeing that respondent was entitled to distribution of Silberman's entire estate. For the reasons set forth below, we disagree.

DISCUSSION

The parties are in agreement that the October 29, 1999 order admitting to probate Silberman's January 24, 1991 will conclusively establishes the validity of that will. (*Estate of Neubauer* (1958) 49 Cal.2d 740, 747.) Appellant is correct in noting that the probate court determines which documents comprise a will when the petitioner presents one or more documents for probate. (*Estate of Salmonski* (1951) 38 Cal.2d 199, 207.) Whether a valid will incorporates some other document by reference is a question of interpretation, however, reserved for decision upon a petition for a decree determining

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determination of the persons entitled to distribution of the decedent's estate" "[a]t any time after letters are first issued to a general personal representative and before an order for final distribution is made."

entitlement to distribution of the estate. (*Estate of Foxworth* (1966) 240 Cal.App.2d 784, 788.) The document incorporated in a will by reference does not become part of a will as does a document integrated into a will. An incorporated document, rather, is "'used to construe and apply the will.'" (*Ibid.*)

A will incorporates by reference a document in existence when the will is executed if the will describes the document sufficiently that it can be identified and manifests the testator's intent to incorporate it. (Prob. Code, § 6130; *Estate of Foxworth*, *supra*, 240 Cal.App.2d at pp. 788-789.) Subparagraph (a) of the fourth article of Silberman's January 24, 1991 will is a pour-over provision. It gives the entirety of Silberman's estate to the "'VIOLA Z. SILBERMAN REVOCABLE TRUST', created earlier today, executed by myself as Settlor." Subparagraph (b) of the fourth paragraph is a savings clause. It provides that "[I]f the disposition in subparagraph (a) . . . is not operative or is invalid for any reason, or if the Trust referred to in that subparagraph fails for any reason, then I hereby incorporate by reference the terms of said Trust, . . . and I give all of my estate to the Trustees named in said Trust, in trust, to be held, administered, and distributed as provided in that instrument."

The attempted disposition under the fourth article, subparagraph (a), is ineffective, for the January 24, 1991 declaration of trust was revoked by the February 15, 1991 declaration of trust. (Prob. Code, § 15401, subd. (a)(2).) The remaining questions are whether subparagraph (b) effectively incorporates by reference the terms of the January 24, 1991 trust and, if so, whether the terms of the trust effectively dispose of Silberman's estate.

The January 24, 1991 declaration of trust clearly was in existence when Silberman executed the January 24, 1991 will. Her intent to incorporate the terms of the trust is obvious. Finally, the will plainly describes the trust terms to be incorporated. The terms of the January 24, 1991 declaration of trust therefore are incorporated by reference into the January 24, 1991 will.

It does not necessarily follow, however, that the terms of the January 24, 1991 trust effectively dispose of Silberman's estate. As aids in interpreting the January 24, 1991 will, the probate court had before it a variety of evidence. In addition to the January 24, 1991 declaration of trust, it had the August 22, 1997 order invalidating the February 15, 1991 trust due to Cheng's exercise of undue influence over Silberman, as well as our May 27, 1999 opinion in *Silberman v. Cheng*, *supra*, affirming that order.

The upshot of the August 22, 1997 order is that the dispositional provisions of the February 15, 1991 trust demonstrate Cheng's exercise of undue influence over Silberman. The key dispositional provision, that naming the residual beneficiary, is the same as the key provision in the January 24, 1991 trust, executed a mere three weeks earlier. It requires no leap of logic to conclude that the same undue influence was at work on January 24, thus rendering the incorporated trust provisions ineffective to dispose of Silberman's estate. (Cf. Prob. Code, § 6104.)

Appellant argues that the court was not empowered to make such a determination, invalidating a provision of the will, in that this far exceeds the court's power to interpret the will. The probate court did not invalidate the dispositional provisions of the January 24, 1991 will. Upon interpreting those provisions in light of the extrinsic evidence available to it, the court resolved a latent ambiguity in subparagraph (b) of the fourth article, revealed by evidence that trust provisions identical to those incorporated in the will were invalid. The court properly resolved the ambiguity thus revealed, determining that it could not give effect to the dispositional provisions of the January 24, 1991 *trust*. (*Estate of Russell* (1968) 69 Cal.2d 200, 207.) This, in turn, rendered the dispositional provisions of the January 24, 1991 *will* ineffective.

Respondent's petition for a decree of entitlement to distribution is not, as appellant would have it, the equivalent of a will contest. At no point did respondent contest the validity of the January 24, 1991 will or any of its provisions. She simply argued that the dispositive provisions of the will were ineffective due to the manner in which the trust was created.

The ineffectiveness of the dispositional provisions does not amount to the collateral invalidation of the January 24, 1991 will. It remains effective in every respect other than its attempt to dispose of the testator's property. It revokes all previous wills and codicils. It expresses the testator's intent to dispose of all of her property. It establishes that, in general, no beneficiary is entitled to interest or income earned or accrued on estate property during the administration of the estate. It further establishes that Silberman intentionally omitted respondent from the will. It contains a valid no-contest clause. It directs the payment of all death taxes and refrains from exercising any testamentary power of appointment. It names alternative executors. Finally, it sets forth the powers of the executor.

Moreover, the ineffectiveness of dispositional provisions does not affect the validity of an instrument as a will. To qualify for probate, a will need not dispose of any property of the decedent. (*Estate of Philippi* (1945) 71 Cal.App.2d 127, 134.) A document simply revoking prior wills and codicils is a will subject to probate. (Prob. Code, § 88.) Where an attempted disposition is ineffective, the lapsed bequest "remains undisposed of by the will and passes to the heirs-at-law." (*Estate of Russell, supra,* 69 Cal.2d at p. 215.) Respondent is an heir-at-law. (Prob. Code, §§ 6402, subd. (a), 6451, subd. (c).)

Appellant argues that the doctrine of dependent relative revocation requires that effect be given to Silberman's 1988 will rather than allowing respondent to take by intestate succession. Under the doctrine, if a testator revokes a prior will based on the mistaken belief that certain facts exist, the revocation can be nullified, giving effect to the prior will. (12 Witkin, Summary of Cal. Law (9th ed. 1990) Wills and Probate, § 240, pp. 274-275.) The doctrine has no application here, however. For it to apply, the former will must be admitted to probate. (*Estate of Christensen* (1902) 135 Cal. 674, 676; see, e.g., *Estate of Kaufman* (1945) 25 Cal.2d 854, 856; *Estate of Robertson* (1968) 266 Cal.App.2d 866, 867.) In the present matter, no will other than the January 24, 1991 will ever was admitted to probate. Indeed, appellant never sought admission of more than one

will to probate. Appellant sought only admission of *either* the January 24, 1991 will *or* the 1988 will, *in the alternative*.

It would have been easy enough for appellant to seek simultaneous admission of two wills to probate (see, e.g., *Estate of Johnson* (1979) 91 Cal.App.3d 800, 802, 805), or later to have sought admission of the 1988 will as well and the January 24, 1991 will (Prob. Code, § 8226, subds. (b), (c).) When two wills are admitted to probate, both may be given effect unless one is entirely inconsistent with the other. (*Estate of Johnson*, *supra*, at p. 806.) This is a matter of will interpretation, however (*id.* at p. 807), and thus not a matter to be determined when wills are offered for probate (*Estate of Neubauer*, *supra*, 49 Cal.2d at p. 747). For this reason, the "probate of an earlier will is not a contest of a later will already admitted to probate." (*Estate of Robertson*, *supra*, 266 Cal.App.2d at p. 867.) Inasmuch as appellant easily could have sought admission to probate of both wills but chose not to do so, the doctrine of dependent relative revocation does not apply.

The order is affirmed.

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SPENCER, P.J.

We concur:

ORTEGA, J.

MALLANO, J.